IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.550 OF 2005
IN
CHAMBER SUMMONS NO.204 OF 2005
IN
SUIT NO.535 OF 2000

Kothari Industrial Corporation Limited .. Appellant.

V/s.

ICICI Limited (Debentures Trustees (Formally known as The Industrial Credit and Investment Corporation of India Ltd.) & Others .. Respondents.

Mr.Aspi Chinoy, senior counsel with Mr.Janak Dwarkadas, Mr.D.H. Mehta, Mr.Chirag Mody & Mr.Siva i/b. R.M.G. Law for the appellant.

Mr.Virag Tulzapurkar, senir counsel with Mr.Chetan Kapadia & Ms.Rajashree Bhatt i/b. M.K. Ambalal for respondent No.1.

Mr.J.P. Cama, senior counsel with Mr.Jaideep Mitra i/b. Laxmi Jessani for respondent No.10.

Ms.Nandini Menon Estate Staff Union South India proposed Intervenor.

CORAM : R.M. LODHA &
J.P. DEVADHAR, JJ.

DATED : 6TH JULY, 2005.

P.C. :

Heard Mr.Aspi Chinoy, the learned senior counsel for the appellant and Mr.Virag Tulzapurkar, the learned counsel for the respondents - decree

holder.

2. On June 23, 2005 a consent decree came to be passed against the present appellant. By the said consent decree, the Court Receiver, High Court, Bombay stood appointed as receiver in execution with power to take possession of the properties set out at Exhibit A-1, A-2, A-3, A-4, A-5, B-1, B-2 and C to the plaint and for sale of the said properties either by public auction or private sale and the Court Receiver was to pay over the net sale proceeds to the plaintiff - debentureholders towards payment of decretal amount. The chamber summons was taken out by the present appellant based on Section 39(4) of the Code of Civil Procedure that the execution of the decree for sale of the property situated outside the jurisdiction of the Court cannot be done by this Court. The said chamber summons was contested by the decree holder. The learned chamber judge vide order dated April 20, 2005 rejected the chamber summons giving rise to the present appeal.

3. Mr.Aspi Chinoy, the learned senior counsel for the appellant strenuously urged that it is the Court that directed the Court Receiver to sell the property in execution of the decree and for its satisfaction from the sale proceeds, and therefore,

the principle that the sale by the Court Receiver is not the sale by the Court is not attracted. The learned Senior counsel would urge that the Court Receiver has not been given all the powers under Order 40 Rule I(d) of the Code of Civil Procedure and that the nature of the power that has been given to the Court Receiver would clearly show that the sale is by the Court and, therefore, Section 39(4) of the Code of Civil Procedure is clearly attracted. The learned senior counsel relied upon the judgment of the Supreme Court in the case of Jibon Krishna Mukherjee & Another V/s. New Beerbhum Coal Co. Ltd. [AIR 1960 Supreme Court 297]. He also relied upon the (Raja) Promothanath Malia V/s. H.V. Low & Co. [AIR 1930 Calcutta 520].

4. On the other hand, Mr.Virag Tulzapurkar, the learned counsel for the decree-holder supported the order passed by the learned Chamber Judge.

5. The relevant clause on which the debate rests in this appeal may be set out by us. It reads thus :

> '(C) The Court Receiver, High Court, Bombay shall without any further order stand appointed by Bombay High Court as Receiver in execution with power to take possession of the properties set out in Exhibit A-1, A-2, A-3, A-4, A-5, B-1, B-2 and C to the Plaint and sell the same either by public

> auction or private sale and the Court Receiver do pay over the net sale proceeds thereof to the Plaintiff / Debentureholders towards payment of decretal amount payable by the Defendant No.1 subject to the rights of the other chargeholders.'

6. We have no hesitation in observing that the appointment of the Court Receiver as set out in clause (c) and power to him to sell the aforementioned properties and to satisfy the decree amounts to an appointment of Court Receiver in execution of the decree under Section 51(d) of the Code of Civil Procedure. The power conferred upon the Receiver in consent decree is in conformity with the provisions of Order 40 Rule I(d). The legal position is well settled that the sale by the Court Receiver is not the sale by the Court and such sale cannot be said to be sale in execution by the Court. In Jibon Krishna Mukherjee, the Supreme Court in para 7,8,9 and 10 held thus :

> '7. It is common ground that the receiver was appointed with power to him to get in and collect the outstanding debts and claims due in respect of the charged property and with all powers provided for in O.40, R.I Cl.(d) of the Code of Civil Procedure'. The order appointing the receiver also expressly directed that the receiver shall be at liberty to sell the said property charged in favour of respondent 1 either by private treaty or by private auction to the best purchaser or purchasers that can be got for the sale but he shall not hold such sale before the 18th day of August 1956. In other words, the receiver was appointed in execution proceedings under S. 51 and was given all the powers under O.40, R.1 (d) of

the Code. It is by virtue of these powers that he entered into the agreement of sale with respondent 2 and sold the property to him and gave him its possession. Section 51 which deals with the powers of the court to enforce execution provides for the execution of the decree by five alternative modes specified in Cls.(a) to (e). One of the modes of execution is the appointment of a receiver which means that a decree for the payment of money can be executed by the appointment of a receiver. He may either collect the income of the property belonging to the judgment-debtor and thereby satisfy the decree, or if so authorised he may sell the property of the judgment-debtor and thereby arrange for the satisfaction of the decree. Thus, in dealing with the question as to whether sale held by the receiver is a sale ordered by the court to which O.21 R.89 applies it is necessary to remember that the appointment of the receiver itself is a mode of execution of the decree.

8. When the receiver so appointed is given all the powers under O.40 R.I(d) it is these powers which he seeks to exercise when selling the judgment-debtor's property in execution of the decree. The sale held by the receiver under such conditions would no doubt be governed by the provisions of O.40 and the court may supervise or issue directions in respect of such a sale under the provisions of the said order. Prima facie the sale held by the receiver appointed in execution proceedings in pursuance of the powers conferred on him under O.40, R.1(d) would be governed by the powers conferred on him and the terms and conditions on which the said powers may have been conferred and by other relevant provisions of O.40. It does not seem to attract the provisions of O.21.

9. Courts have had occasion to consider questions about the applicability of several provisions of O.21 to sales held by receivers and opinions expressed on such questions have differed more particularly in the Calcutta High Court as we will presently indicate. In the present appeal we do not propose to consider or decide the general question about the character of the sale held by the receiver nor do we propose to

attempt to specify which provisions of O.21 will apply to such sales and which will not. We are dealing with the narrow question as to whether O.21, R.69 applies to such a sale; and it is to the decision of this narrow question that we will address ourselves in the present appeal.

10. Order 21, R. 89 enables the persons specified in Sub-r (1) to apply to have the sale held in execution proceedings set aside on two conditions, (a) the applicant must deposit for payment to the purchaser a sum equal to 5 per cent of the purchase money, and (b) for payment to the decree-holder the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered less any amount which may since the date of such proclamation of sale have been received by the decree-holder. The second requirement immediately raises the question as to whether it is necessary for the receiver in selling immoveable property in execution proceedings to issue a proclamation as required by O.21, R.66 of the Code. In our opinion there can be no doubt that the provisions of the said rule do not apply to sales held by receivers. No decision has been cited before us where a contrary view has been expressed. The provisions of the said rule apply where property is ordered to be sold by public auction in execution by the court, and the order for the sale of such property must be made by any court other than the Court of Small Causes as provided by R.82. Where the court appoints a receiver and gives him liberty to sell the property the receiver may either well, the property and thereby realise the money for the satisfaction of the decree, or he may, even without selling the property, seek to satisfy the decree by the collection of rents due from the property or other ways open to him under the law. In such a case it is difficult to hold that by the very appointment of the receiver clothing him with the power to sell the property if he thought it necessary to do so the court has ordered the sale of the said property within the meaning of O.21, R. 82. If the provisions of R.66 of O. 21, are inapplicable to sales held by receivers it is obvious that the second condition prescribed by R.89(1)(b) is equally

> inapplicable and it is undoubtedly one of the two essential conditions for the successful rule. In our opinion this fact clearly emphasises the inapplicability of the whole rule to sales held by receivers. We are, therefore, satisfied that the High Court was right in refusing to entertain the appellants' application under O.21 R.89.'

7. It is thus clear that one of the modes of execution is the appointment of the Receiver. When the Receiver is appointed in execution proceedings under Section 51 and is given the powers under Order 40 Rule I(d) of the Code, it does not attract the provisions of Order 21. In the facts and circumstances of the present case, we have no doubt in holding that the appointment of the Court Receiver in aforesaid clause (C) of the consent decree was nothing but an appointment in execution proceedings under Section 51 and the appointment of the Court Receiver has to be treated as appointment under Section 51(d). The power to the Court Receiver to take possession of the properties and for its sale by public auction or private sale to satisfy the decree is the power under Order 40 Rule I(d). We hold that the sale being effected by the Court Receiver is not a sale by the court and the provisions of Order 21 are not attracted.

8. Relying upon para 10 of the judgment of the Supreme Court in the case of Jibon Krishna Mukherjee,

it was urged by the learned senior counsel that if the Court directs sale of the property, Order 21 is clearly attracted and in the present case clause (c) reflects that it was the Court that has directed the Court Receiver for sale of the property. Para 10 of the judgment of the Supreme Court in the facts and circumstances of the present case does not help the case of the appellant at all. The sale by the Court Receiver pursuant to the power given to him in the consent terms is not the sale by the Court nor it is under the order of the Court. That being so, Order 21 has no application.

9. All in all the learned Chamber Judge cannot be said to have erred in rejecting the chamber summons. The appeal is dismissed in limine.

(R.M. LODHA, J.)

(J.P. DEVADHAR, J.)